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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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September 3, 1993

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

93-191

Re: RM-8088

Dear Mr. Caton:

Transmitted herewith on behalf of Pikes Peak Broadcasting Company, licensee of Stations KRDO-TV, Colorado Springs, Colorado, and KJCT-TV, Grand Junction, Colorado, are an original and four copies of its Comments in the above-referenced rule making proceeding.

Should any questions arise concerning this matter, please communicate with the undersigned.

Very truly yours,

FLETCHER, HEALD & HILDRETH

Kathleen Victory
Kathleen Victory

KV/bi

Enclosures

cc: Ms. Patti Hoth
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RM-8088

COMMENTS

1. The Commission notes that it has "several areas of concern" on which it seeks comment. NPRM, ¶6-7. In addition to comments regarding the proposed channel exchange generally, the Commission requested comment on the following three specific areas: (a) whether the exchange of transmitting facilities at Baculite Mesa is in the public interest, (b) whether, in light of

¹ Pikes Peak Station KRDO-TV necessarily competes for audience with all other stations providing service to Colorado Springs . Since this proceeding considers a proposal by two Pueblo licensees seeking to expand their coverage in Colorado Springs, Pikes Peak is an interested party. In addition, the Cheyenne Mountain transmitter site specified in the expired CP issued to University and sought by SCC in a proposed "swap" is short-spaced with Pikes Peak Station KJCT-TV, Grand Junction, Colorado.

University's earlier stated need to provide continued service to Colorado Springs by means other than a translator, the exchange proposal meets this need and would be in the public interest, and (c) whether the exchange proposal, if granted, would result in actual expansion of University's noncommercial television (as opposed to translator) service.

1. THE BACULITE MESA TRANSMITTER SITE

2. Pikes Peak opposed the exchange contained in the Petitioners' "Petition for Issuance of Notice of Proposed Rule Making to Exchange Channels" (the "Facilities Exchange Proposal") in its entirety as not being in the public interest. That proposal is not part of this NPRM and the Commission has limited this proceeding to the exchange of facilities at Baculite Mesa where they are presently located. Thus, Pikes Peak agrees with the Commission that if the exchange is granted as set forth in the NPRM, then the SCC Channel 8 authorization should not be modified to specify the authorized but expired² University transmitter site on Cheyenne Mountain.³ The Commission has wisely proposed to

² As noted in the NPRM, University's Cheyenne Mountain CP expired in February 1993. An application for extension of time to construct, contested by Pikes Peak, is on file. NPRM, n. 1. The Commission further noted that University's stated basis for requesting an extension of the construction permit, i.e., its participation in this rulemaking proceeding, is a business judgement and not an acceptable basis under the controlling FCC Rule, Section 73.3535(b), for failing to timely construct the modified facilities. As established in Pikes Peak's "Petition to Revoke and Deny CP Extension" filed February 19, 1993, and its "Supplement to Petition to Revoke and Deny CP Extension" filed April 7, 1993, University has no intention to construct at the Cheyenne Mountain site.

³ NPRM, ¶7.

authorize SCC to operate from University's licensed transmitter site on Baculite Mesa⁴ because, among other things, University has not constructed the facilities at the short-spaced Cheyenne Mountain site. It is well known that while the Commission supports the expansion of noncommercial educational programming, the Commission made it abundantly clear in granting University's short-spacing waiver that the grant was based upon University's status as a noncommercial educational facility.⁵ In contrast, SCC is a full blown commercial operation and the rejected facilities exchange proposal was but another attempt by SCC to improperly obtain a transmitter site on Cheyenne Mountain. That SCC sought, by means of the Commission's channel exchange policy, to circumvent the Commission's short-spacing rules is abundantly clear, a matter recognized by the Commission in the NPRM. Thus, the exchange proposal is limited to that set forth in the NPRM, namely that SCC's authorization would be modified to specify operation on Channel 8 from University's licensed transmitter site on Baculite Mesa.

⁴ The current licensed transmitter sites of both University and SCC are on Baculite Mesa.

⁵ As Pikes Peak has stated, it did not oppose University's application to move its transmitter to the Cheyenne Mountain site despite the fact that it is short spaced with Pikes Peak Station KJCT-TV because Pikes Peak is supportive of the expansion of noncommercial educational programming. Pikes Peak most assuredly would have opposed (and if the exchange proposal is granted and SCC seeks a waiver to move to the Cheyenne Mountain site or if an attempt is made to assign the CP from University to SCC, it will oppose) the waiver request of a commercial station licensed to another community for the same site.

II. UNIVERSITY'S NEED FOR EXPANDED SERVICE WITHOUT TRANSLATOR

3. The Commission's next area of concern arises out of the apparent dichotomy between University's representations in its Cheyenne Mountain short-spacing waiver request and the Joint Exchange Proposal. For years University has been operating its main facility from its Baculite Mesa site and rebroadcasting its signal into Colorado Springs via a translator.⁶ When its former Channel 53 translator was displaced by the operation of a full power facility on Channel 53 at Castle Rock, Colorado, University filed an application on January 22, 1990 to move the transmitter site of its full power facility from Baculite Mesa to a short-spaced site on Cheyenne Mountain in order to prevent loss of

⁶ University's Channel 53 Colorado Springs translator was displaced in July 1990 by the initiation of operation by full power station KWHD(TV), Channel 53, Castle Rock, Colorado. However, while waiting for Commission action on its Cheyenne Mountain modification application, University, at its own cost, constructed SCC's television translator K15BX, obtained by SCC on a "potential" displacement basis which never occurred, and has operated it pursuant to an STA obtained by SCC. SCC's efforts to modify the CP to reflect use of the facility to rebroadcast University's Channel *8 signal were rejected as a result of the ATV Freeze. Pikes Peak has opposed SCC's efforts to extend the CP for K15BX since it was obtained in contravention of existing Commission rules and policies. See Pikes Peak's Petitions for Reconsideration filed November 19, 1992 and February 9, 1993. Pikes Peak has also opposed SCC's efforts to extend the STA for K15BX on the grounds that the translator was illegally obtained and wrongfully retained since SCC's existing Colorado Springs translator was not displaced and since SCC's continued retention of the CP and extension of the STA has prevented University from obtaining the translator which it constructed and operates at its own cost, on a legitimate displacement basis. See, Pikes Peaks' Opposition to Extension of STA filed July 9, 1993.

coverage of Colorado Springs and to obviate the need for a translator.

4. In support of the Cheyenne Mountain short-spacing waiver, University expressed a need to provide an adequate signal to Colorado Springs since, although KTSC is licensed to Pueblo, Colorado Springs "is part of the area which the University of Southern Colorado was created to serve. . . ." University argued that it could not provide an adequate signal to Colorado Springs from its licensed transmitter site on Baculite Mesa. University arguing the alleged lack of other available translators and that no other television channel substitution could be sought as a result of the ATV Freeze, concluded that operation from the short-spaced Cheyenne Mountain site was the only viable means by which University could provide an adequate signal to Colorado Springs. See, "Amendment to Request for Waiver" submitted by University on March 8, 1990. In its order granting the extraordinary short-spacing waiver, the Commission staff acknowledged the "unique role of noncommercial educational stations" and University's critical need to provide service to Colorado Springs as the primary basis for granting University's short-spacing waiver. See Letter Grant from Barbara Kreisman, 8940-MLB, dated February 28, 1992.⁷

5. That the proposal tendered by the Petitioners in the Facilities Exchange Proposal is at odds with University's

⁷ As noted in the NPRM, however, in the more than 30 months since the grant of the modification application, no construction has been commenced on the Cheyenne Mountain site.

representations in the Cheyenne Mountain short-spacing waiver request is recognized in the NPRM. The Facilities Exchange Proposal left University operating from the transmitter site at which it has operated for years and continuing to serve Colorado Springs via a translator.

6. University's position in the Facilities Exchange Proposal makes clear that University has abandoned its intent to move to Cheyenne Mountain.⁸ If the exchange is granted, University's coverage of Colorado Springs will not expand, but will remain virtually unchanged. It will continue to operate its full power facility from Baculite Mesa and rebroadcast its signal to Colorado Springs via translator.⁹

7. In the NPRM, the Commission expressly indicated that it does **not** believe that it is "desirable to replace primary service to [Colorado Springs], as contemplated in connection with [University's] waiver request, with a secondary service which could ultimately be forfeited to a full service television operation. . . ." NPRM, ¶8. It was precisely this problem, displacement, that gave rise to University's request to move its site.¹⁰

⁸ As Pikes Peak argued in its Petition to Revoke and Deny CP Extension, since University has no intention of constructing the Cheyenne Mountain site as a means of expanding noncommercial service to Colorado Springs, no further basis exists for the continuation of the expired Cheyenne Mountain CP.

⁹ In addition, University intends to construct additional translators at Durango and Grand Junction to improve its coverage.

¹⁰ The reason University indicated in its waiver request that no other translators were available for its use was in part because SCC had obtained, on the basis of a displacement that never occurred, a CP for K15BX. SCC has illegally retained the

III. ACTUAL INCREASE IN COVERAGE

8. The increase in coverage which the Petitioners' claim would result from the facilities exchange is illusory. Any actual gain in noncommercial coverage is de minimis.¹¹ As noted in the NPRM, ¶9, nearly all of the alleged gain is the result of the construction of additional translators¹² and not from the actual exchange of facilities. Since translators are a secondary service, any service gain is speculative at best.¹³ As noted earlier,

construction permit for K15BX for nearly three years since the threatened loss of its translator K30AA ceased when SCC's application to acquire the construction permit for Station KPCS, Channel 32, Pueblo, Colorado, was finally denied and the CP canceled. In the NPRM, the Commission refers to University's "STA operation of its translator Station K15BX." NPRM, ¶9 (emphasis supplied). In fact, University is neither the licensee nor the permittee of translator Station K15BX. SCC is the permittee of K15BX, and obtained the STA to operate K15BX at variance with the terms of its CP to keep it alive.

¹¹ Moreover, if as proposed in the NPRM, the exchange is granted allowing SCC to operate from the licensed University transmitter site and not from the Cheyenne Mountain site as intended by the Petitioners, then effectively there will be no increase in commercial service either. Despite the ostensible purpose for the exchange presented by the Petitioners, their underlying intent is clear. SCC is willing to pay University \$1,000,000 to obtain a site it could not otherwise legitimately obtain and University is willing, for money, to forgo the expansion of its noncommercial service which would result from the move to the Cheyenne Mountain.

¹² University has already filed applications for authorization to construct additional translators at Grand Junction, Durango, Ignacio and Cortez-Red Mesa. In its January 1993 NTIA funding proposal regarding these facilities, University certified that it is financially qualified to meet its matching obligations. Once again, according to University, the SCC money is not needed to construct and operate the proposed facilities.

¹³ The Commission asks the Petitioners whether they would be willing to accept a grant of the exchange proposal conditioned upon the commencement of this expanded service by University. Whether the Petitioners would accept this condition is irrelevant.

whether or not the exchange is approved, it appears that University will continue to operate from its existing Baculite Mesa transmitter site and that it will continue to provide coverage to Colorado Springs via translator as it has done for years, initially by means of its own Channel 53 translator and more recently by means of SCC's Channel 15 translator K15BX.¹⁴ Reliance upon the insubstantial and tenuous increase in noncommercial service as the basis for a claim that the public interest supports this exchange is absurd.

9. The only benefit flowing to University as a result of the proposed exchange is a monetary payment from SCC. However, the payment is not needed for the construction of the translators and University has argued¹⁵ that it is financially qualified not only to construct at the Cheyenne Mountain site but also the proposed translators at Grand Junction and Durango without the funds from SCC. Thus, there is no financial need for University to engage in

Regardless of whether they accept the conditional grant, the additional translators sought by University can and may still be eventually displaced by the initiation of service by full power facilities.

¹⁴ Since SCC's operation of television translator K30AA was never displaced, the basis for the construction permit for translator K15BX no longer exists. The facility was constructed and has been operated by University since August 1990 and not by SCC. No justification exists for SCC to continue illegally warehousing a translator.

¹⁵ See Pikes Peak's pleadings referred to in note 3, *supra*; Petitioners' "Joint Opposition to Petition to Revoke and Deny CP Extension" filed March 4, 1993; Pikes Peaks "Petition to Deny" University's translator applications filed August 16, 1993; and University's "Opposition to Petition to Deny", filed August 31, 1993.

this exchange.

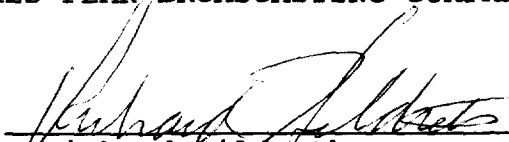
Pikes Peak fails see how the Petitioners' Facilities Exchange Proposal, even as modified in the NPRM, is in the public interest. The short-spaced Cheyenne Mountain transmitter site cannot be exchanged because to do so would circumvent the Commission's important short-spacing rules. Without the Cheyenne Mountain site, there can be no doubt that SCC will refuse to go through with the exchange. Pikes Peak did not object to University's previously stated need for expansion of noncommercial service by means of a full power facility on Cheyenne Mountain even though the site is short-spaced with Pikes Peak Station KJCT. The exchange proposal would destroy the expanded noncommercial coverage which was the sole reason for the grant of the University CP for the short-spaced site. The exchange proposal relies upon expansion of noncommercial service resulting from the use of secondary service translators which could be displaced by a full power facility. That expansion is being proposed by University separate and apart from the exchange and is using funding which University claims it already has. The public interest does not support the replacement of substantially improved coverage from a full power facility with minimally improved coverage from secondary, displaceable facilities. The Petitioners have failed to show that the public interest would support the facilities exchange requested in Petitioners' Facilities Exchange Proposal. The exchange either

should be denied or granted in the form proposed by the Commission with both transmitters remaining on Baculite Mesa.

Respectfully submitted,

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September 3, 1993

CERTIFICATE OF SERVICE

I, Rebecca Ingham, a secretary in the law offices of Fletcher, Heald & Hildreth, hereby certify that I have on this 3rd day of September, 1993, had copies of the foregoing "COMMENTS" mailed by first class U.S. Mail, postage prepaid, to the following:

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